(1950) 03 GAU CK 0005

In the Gauhati High Court

Case No : Second Appeal No. 207 of 1948

Siva Kanta Barua and Others APPELLANT

Vs

Rajaniram Nath and Others RESPONDENT

Date of Decision : 21-03-1950

Acts Referred:

Citation : AIR 1950 Guw 154

Hon'ble Judges : T.V. Thadani, C.J;Ram Labhaya, J

Bench : Division Bench

Advocate : S.K. Ghose, K.R. Barooah and H. Deka, for the Appellant; A.P. Goswami and D.N. Medhi, for the Respondent

Judgement

Thadani, C.J.—This is a second appeal from the judgment and decree of the learned District Judge, A. V. D., dated 13th August 1947, by which he affirmed the judgment and decree of the trial Court which had dismissed the plaintiffs'' suit with costs against the contesting defendants.

2. It appears that an appeal against the decision of the trial Court, dated 24th November 1941, was preferred to the then District Judge, A. V. D., Mr. N. L. Hindley who delivered judgment on 23rd March 1942. On a second appeal preferred to the High Court of Calcutta against the decision of Mr. Hindley, Biswas and Blank JJ. remanded the appeal with the following, among other directions:

The question that we have got to consider is whether the testator did create any endowment and, if so what were the terms of such endowment?

3. It is not necessary to set out the other directions which the learned Judges of the Calcutta High Court gave to the lower appellate Court in their order of remand, in view of the fact that the only question argued before us was the question set out above.

4. The facts material for the appeal are these. One Phanidhar Barua had 2 sons--Payodhar (defendant 4) and Lakshmidhar (plaintiff 1). Plaintiff 2, one Premodhar,

is the son of Payodhar (defendant 4). Phanidhar left a will, dated 2nd of chaitra, 311 B. S., by which be left some 733 bighas of land to Lakshmidhar, and 564 bighas to Payodhar, and in respect of 700 other bighas, he created an endowment for the maintenance of namghar and appointed Payodhar as the Manager. The income from the 700 bighas was to be devoted to the maintenance of the namghar and meeting expenses connected with the lighting of lamps and smearing of the floor with wet earth. Panidhar Barua lived for some 6 years after the making of the will. During his lifetime, he had installed in the namghar, a manuscript of the 10th canto of the "Dashamskanda Bhagabat Gita" given to him by his spiritual preceptor. The sacred manuscript, so enshrined in the namghar, was to be maintained from the income of the endowment which is said to have been in the neighbourhood of Rs. 200 per annum.

5. Some 30 years after the death of Phanidhar in 1315 or 1316 B. S., plaintiff 1 Lakshmidhar applied for letters of administration of the will executed by his father, which were granted to Lakshmidhar six years later in 1639.

6. Same time before plaintiff 1 applied for letters of administration. It appears that defendant 4 (Payodhar) mortgaged some 130 bighas odd out of the endowed property to defendant 2 in 1930. In due course defendant 3 brought a suit upon the mortgage and obtained a decree in 1934, and purchased the property in execution of his decree. The sale was confirmed on 27th January 1936. Defendant 4 had also mortgaged some 63 bighas odd out of the endowed property to defendant 1, who brought a suit upon the mortgage and obtained a decree on 6th October 1936, and in execution of the decree, purchased 63 bighas odd on 10th September 1940. While the property was under attachment in execution of the decree obtained by defendant 1, defendant 4, as judgment-debtor sought to have the property released from attachment on the ground that the property was endowed property. This application was dismissed on 24th February 1910. Defendant 4 had also mortgaged 288 bighas odd out of the endowed property in favour of defendant 3 (a), the Gauhati Bank Ltd., which obtained a decree, and the Court ordered a sale of the 288 bighas odd to take place on 4th August 1941. The present suit was instituted in the beginning of 1941 by plaintiffs 1 and 2, for a declaration that the property alienated by defendant 4, was endowed property under the will of Phanidhar Barua, and that the property was not liable to be attached and sold for the personal debts of defendant 4.

7. On the pleadings, the trial Court framed the following issues:

(1) Whether the plaintiffs have got any locus standi to file this suit? (2) Whether the suit is bad for multifariousness of causes of action? (3) Whether the salt is properly valued? (4) Whether the suit is barred by If limitation? (6) Whether there is the institution by the same of "Rajaduar Desamskandha Bhagabat Sthapita Namghar", as alleged in the plaint, and whether the plaintiffs and defendant 4 (pro forma) are the de facto Shebayets of the said institution? (6) Whether the property in suit is the trust property of the alleged namghar and has

been used as such, or is the private property of defendant 4 and has been used as the private property of the said defendant 4? (7) Whether the alleged endowment is a real and bona fide one, or a colourable and nominal one, as alleged in the W. S.? (8) Whether the purchases of defendants 1 and 2 in Civil Court''s sales are bona fide and for value, and without notice? (9) Whether the plaintiffs have any title and interest over the property in dispute? (10) To what relief, if any, are the plaintiffs entitled?

8. As a result of its findings, the trial Court dismissed the plaintiffs'' suit. The lower appellate Court, on remand by the Calcutta High Court, has affirmed the judgment and decree of the trial Court.

9. We think the lower Appellate Court has erred in holding that a valid endowment had not been created by Phanidhar Barua under his will, dated 4th April 1906. The lower appellate Court has taken the view that the alleged endowment was a colourable transaction designed to keep the property in question with the family of the deceased in perpetuity. We are not impressed by the reasons which the lower appellate Court has given for coming to this finding. It is true that the testator''s son, Payodhar (defendant 4) did not carry out the terms of the will made by his father, that contrary to the terms of the will, be had his name mutated in the record of rights as owner, instead of as a Manager, that he kept no accounts of the income and expenditure of the trust property, and proceeded to create mortgages some years later for his personal debts. But as the learned Judge himself points out, these acts of Payodhar would not necessarily affect the question as to whether the endowment made by Phanidhar under his will, was an endowment validly created. It is true that even under a will, a fictitious endowment might be created for the purpose of preventing the family property from being alienated, but each case has to be decided on its merits, and we are unable to characterise the will in question as a document designed to create a fictitious endowment.

10. The learned Judge has stressed the fact that at the time of making the will, the namghar itself was a private family property, and continued to remain so at the death of the testator--a circumstance which, according to the learned Judge, tends to show that the testator did not divest himself of all his rights in the endowed property.

11. We think the learned Appellate Judge bad misdirected himself on certain material facts in the case. He appears to think that the endowment was created by Phanidhar Barua during his lifetime. That is clearly erroneous. The endowment was expressly created by the will of Phanidhar to take effect upon his death, and not before. There was, therefore, no question of the testator divesting himself of his rights in the endowed property during his lifetime. The Lahore case, to which reference has been made by the learned Judge Jai Dayal v. Bam Saran Das A I. R.19S8 Lab. 686 : (I.L.R.(1938) Lah. 704) was not a case where the trust was created by a will, to come into effect on the death of the testator.

12. We will now proceed to consider the circumstances from which the learned Judge has inferred that the endowment was fictitious. It appears that under the will the testator had left 733 bighas to Lakshmidhar, plaintiff 1, whereas he left only 600 bighas odd to Payodhar (defendant 4). The learned Judge has drawn from this unequal division the inference that as a smaller area was given to Payodhar, the testator intended to compensate him by ostensibly setting apart some 700 bighas as endowed property, but, in fact, it was set apart for the benefit of Payodhar and his successors in perpetuity. The inference is scarcely logical. There may be a variety of reasons which induced the testator to give more land to one of his sons. Indeed the recitals in the will show that the properties which were allotted to the testator''s sons were allotted to them as a result of a partition made by the testator himself. The intention of the testator in this case must be gathered from the language and terms of the will, and not from any logically erroneous inferences which the Courts think proper to draw. It is not inconceivable that the property made over to Payodhar (defendant 4) was more valuable than that made over to Lakshmidhar. We do not think that the apparently unequal division of the property between the two sons, is any indication of the testator''s intention or design so to make a will that property ostensibly described as endowed property, would nevertheless enure for the benefit of the family in perpetuity. Nor do we think there is any substance in the reasoning that because Payodhar did not act up to the terms of his father''s will, his father never intended to make a genuine endowment, The facts of Payodhar might well be acts of a trustee or Manager de son tort in spite of the fact that he was the testator''s son. Payodhar''s acts cannot, therefore, be properly construed as indicating an intention of the testator to make a fictitious endowment.

13. Another circumstance which the learned Judge has stressed is that the namghar itself was retained as the private property of the testator''s sons. We do not think this circumstance has any bearing on the question as to whether the endowment made under the will was a genuine or fictitious endowment. The purpose of the endowment was not the namghar. but the installation of a manuscript of the 10th canto of the "Dashamskanda Bhagabat Gita" to be lodged in the namghar, that is to say, the namghar was merely intended to house, the manuscript. It was no part of the endowed property. The manuscript had to be housed some where; it matters not-if the manuscript was to be housed in private property which was to be called namghar. It is not disputed that the object or the purpose of the endowment waft religious. If an endowment is created for the purpose of advancing a religious purpose in this case the religious purpose being the installation of a manuscript of the 10th canto of "Dashamskanda Bhagabat Gita," we can find no justification for the learned Judge''s view that as the namghar was not a part of the trust property, the endowment was a fictitious endowment.

14. The learned Judge then proceeded to infer a fictitious endowment from the fact that, whereas the income from the endowed property was Rs. 200 annually, the expenses in connection with the maintenance of the endowed property

amounted to a sum of Rs. 50 only, the suggestion being that the balance was intended for the benefit of Payodhar.

15. It may be that there is evidence that a sum of RS. 60 only was necessary for the maintenance of the endowed property, but that does not mean that the testator, at the time of making the will, knew that only Rs. 50 would be sufficient for the purpose. Even assuming for the sake of argument that only Rs. 50 were required for the purpose, it does not follow that because a small portion of the income of the endowed property was used for the purposes of the endowment, the endowment was a fictitious one. Mr. Goswami for defendant 1 who alone is contesting the appeal, has not referred us to any provision of law by which an endowment is to be regarded as fictitious if only a portion of the income of endowed property is used for the purposes of the endowment.

16. It is true that where a question arises as to whether an endowment is real or fictitious, the mode of dealing with it by its donor and successors is an important element for consideration. But where an endowment takes effect upon the death of the testator, and there is nothing to show that the testator bad during his life time given oral or written directions contrary to the terms of the endowment created under the will, or where there is absence of facts or circumstances leading to the inference that the endowment created under the will is fictitious one, the question of the testator''s mode of dealing with the endowment does not really arise, and if the manager of the endowment deals with it in a manner contrary to the terms of the endowment he can properly be regarded as a Manager de son tort whose wrong acts cannot be regarded as reflecting the intention of the testator so as to characterise the endowment which is to take take effect upon his death as fictitious.

17. It is to be observed that there is no evidence in this case whatsoever that the testator had incurred debts during his life time; on the contrary, the evidence shows that it was not until some 20 years after the death of the testator that his son, defendant 4 mortgaged the endowed property for his personal debts. It would, we think, be quite improper even remotely to connect the personal debts of defendant 4 incurred many years after the death of his father, with his father''s intention to create a fictitious endowment. There is nothing on the record to show that the testator intended to defeat the provisions of the ordinary law by descent or to restrain alienation and to retain the property in perpetuity in the family; on the contrary, the partition effected by the testator during his life time between his two sons, is evidence to the contrary.

18. It is not disputed that an endowment is not to be regarded as fictitious merely because the members of the settler''s family who are nominated as shebaits or mohunts to the endowed property, are to be remunerated out of its income. It is true that the remuneration must be reasonable having regard to the income of the endowed property. But under the terms of the will in question no remuneration was allowed to defendant 4 for managing the endowed property. It may be that the income of the endowed property was Rs. 200 annually and

expenses Rs. 50 only, but there is not evidence that the testator knew that the expenses would be Rs. 60 and that the balance of the income was to be appropriated, with the knowledge of the testator by defendant 4 for his own use. It may well be that the testator was a man of generous instincts and he fully intended that the entire income of Rs. 200 would be used for the purposes of the endowment, If the testator''s generous instincts were frustrated by his son''s greed or miserliness, no inference of a fictitious endowment can be drawn against the testator by reason of such greed or miserliness of his son.

19. A solemn document such as a will, must be respected by Courts of law, and I think it would be an act of injustice to attribute to a dead man who has created an endowment to take effect on his death, an intention to create a fictitious endowment merely because the person in whom he reposed confidence has betrayed his confidence.

20. We are satisfied that the reasons which the learned Judge has given for coming to the conclusion that the endowment in this case was a fictitious one cannot be sustained. In this view, the judgment and decree of the lower Appellate Court must be set aside.

21. The result is that the appeal is allowed with costs of the first appeal and this appeal, except from respondents 3 and 3a. The suit is decreed with costs except from respondents 3 and 3a declaring that the attachment and sale of the property which were attached and sold by defendants 1, 2, 3 and 3 (ka) in execution of their decrees, were not binding on the endowed property sot apart by the testator under his will, dated 4th April 1905.

22. Mr. Medhi for respondent 3 (a) did not press the case on behalf of his client as he stated that the matter as between the appellant and his client had been settled out of Court.

Ram Labhaya, J.

23. I agree.

